3. If there are any exceptions to the application of Section 3224, this case is not within them, and the maintenance of the action is barred by the statute.

ARGUMENT

I

UNDER SECTION 3224 OF THE REVISED STATUTES THE COLLECTION OF A TAX ALLEGED TO HAVE BEEN ERRONEOUSLY ASSESSED MAY NOT BE RESTRAINED

The sole question presented is whether or not the District Court had jurisdiction of this action to restrain the collection of a tax in view of the provisions of Section 3224 of the Revised Statutes. The court below held that Section 3224 does not prevent an injunction in a case apparently within its terms when extraordinary and exceptional circumstances exist which make it inapplicable. It concluded that such circumstances existed in this case. (R. 82-83.)

While the bill of complaint alleged that the Act of August 2, 1886, imposed a penalty in the guise of a tax, there can be no doubt that the petitioner was seeking to collect a tax and not a penalty. *McCray* v. *United States*, 195 U. S. 27. This Court has recently refused to reconsider the question. *Ed. S. Vail Butterine Co.* v. *Reinecke* 49 F. (2d) 1076 (C. C. A. 7th), certiorari denied October 19, 1931 (No. 292, October Term, 1931).

In this case the Commissioner of Internal Revenue, the officer having general jurisdiction of the subject of assessing and collecting oleomargarine taxes, held that the product was taxable, and under color of his office, through the petitioner Collector, demanded payment of the tax. Section 3224 of the Revised Statutes prohibits suits to restrain collection of taxes and the exclusive remedy of a taxpayer who claims the assessment was erroneous or illegal is by a suit to recover the tax after it is paid. *State Railroad Tax Cases,* 92 U. S. 575, 613; *Snyder* v. *Marks,* 109 U. S. 189, 192, 193; *Dodge* v. *Osborn,* 240 U. S. 118; *Graham* v. *duPont,* 262 U. S. 234; *Phillips* v. *Commissioner,* 283 U. S. 589, 595–596. Cf. *Smallwood* v. *Gallardo,* 275 U. S. 56. In *Snyder* v. *Marks, supra,* this Court said (p. 192) that the word "tax" as used in Section 3224 of the Revised Statutes meant—

> * * * that which is in a condition to be collected as a tax, and is claimed by the proper public officers to be a tax, although on the other side it is alleged to have been erroneously or illegally assessed.

And, again (p. 193), that the inhibition of the section—

> * * * applies to all assessments of taxes, made under color of their offices, by internal revenue officers charged with general jurisdiction of the subject of assessing taxes against tobacco manufacturers. The rem-

> edy of a suit to recover back the tax after it is paid is provided by statute, and a suit to restrain its collection is forbidden. The remedy so given is exclusive, and no other remedy can be substituted for it.

A similar declaration was made in *Graham* v. *duPont, supra,* at p. 255.

In the *State Railroad Tax Cases, supra,* the Court referred (p. 613) to the "complete system of corrective justice" which Congress had provided, founded upon administrative appeals with the provision for recovering the tax by action at law after it had been paid. The Court then said (pp. 613–614):

> But there is no place in this system for an application to a court of justice until after the money is paid.
>
> That there might be no misunderstanding of the universality of this principle, it was expressly enacted, in 1867, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court." Rev. Stat. sect. 3224. And though this was intended to apply alone to taxes levied by the United States, it shows the sense of Congress of the evils to be feared if courts of justice could, *in any case,* interfere with the process of collecting the taxes on which the government depends for its continued existence. It is a wise policy. It is founded in the simple philosophy derived from the experience of ages, that the payment of taxes has to be enforced by sum-

> mary and stringent means against a reluctant and often adverse sentiment; and to do this successfully, other instrumentalities and other modes of procedure are necessary, than those which belong to courts of justice. (Italics are the Court's.)

This Court has frequently noted the danger inherent in committing to the courts any "general power of impeding or controlling the collection of taxes or relieving the hardship incident to taxation." *Cheatham* v. *United States*, 92 U. S. 85, 89.

Under these decisions Section 3224 of the Revised Statutes is an absolute bar to the maintenance of an action to restrain collection where the assessment is of a tax as distinguished from a penalty in the guise of a tax and is made by an officer having general jurisdiction over the subject matter, who asserts that the assessment is valid.[1]

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[1] Section 3224 has been held to bar suits to restrain collection of taxes under varying circumstances. *Moore* v. *Miller*, 5 App. D. C. 413; appeal dismissed, 163 U. S. 696; *Nichols* v. *Gaston*, 281 Fed. 67 (C. C. A. 1st); *Page* v. *Polk*, 281 Fed. 74 (C. C. A. 1st); *Hernandez* v. *McGhee*, 294 Fed. 460 (C. C. A. 8th); *Bashara* v. *Hopkins*, 295 Fed. 319 (C. C. A. 4th), certiorari denied, 265 U. S. 584; *Cadwalader* v. *Sturgess*, 297 Fed. 73 (C. C. A. 3d), certiorari denied, 265 U. S. 584; *Seaman* v. *Bowers*, 297 Fed. 371 (C. C. A. 2d), affirmed on other grounds, 273 U. S. 346; *Sigman* v. *Reinecke* 297 Fed. 1005 (C. C. A. 7th), certiorari denied, 264 U. S. 597; *Reinecke* v. *Peacock*, 3 F. (2d) 583 (C. C. A. 7th), certiorari denied, 268 U. S. 699, appeal dismissed, 271 U. S. 643; *McDowell* v. *Heiner*, 15 F. (2d) 1015 (C. C. A. 3d), affirming 9 F. (2d) 120, certiorari denied, 273 U. S. 759; *Reinecke* v. *O. D. Jennings & Co.*, 16 F. (2d) 927 (C. C. A.

The true basis of this suit was that petitioner proposed to collect a tax which respondent asserted was erroneously assessed. But Section 3224 expressly prohibits the testing of the validity of an assessment by injunction. In *Snyder* v. *Marks, supra,* at p. 192, this Court pointed out that the word "tax" as used in Section 3224 meant a tax which was alleged to be "erroneously" or "illegally" assessed. In *Dodge* v. *Osborn, supra,* the statute was applied, although it was alleged that the tax there involved was illegal.

The court below held that the respondent's product was not taxable. This conclusion was reached apparently because the court considered that Sec-

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7th), certiorari denied, 274 U. S. 753; *Ralston* v. *Heiner*, 24 F. (2d) 416 (C. C. A. 3d), certiorari denied, 277 U. S. 608; *Ellay Co.* v. *Bowers*, 25 F. (2d) 637 (C. C. A. 2d), certiorari denied, 277 U. S. 606; *Wright & Taylor* v. *Lucas*, 45 F. (2d) 75 (C. C. A. 6th), affirmed, 282 U. S. 409; *Keogh* v. *Neely*, 50 F. (2d) 685 (C. C. A. 7th), appeal dismissed and certiorari denied November 2, 1931 (No. 371, Oct. Term, 1931); *Pullan* v. *Kinsinger*, 2 Abb. 94 (C. C. 6th S. D. Ohio); *Kissinger* v. *Bean*, Fed. Cas. No. 7,853; *Kensett* v. *Stivers*, 10 Fed. 517 (C. C. S. D. N. Y.); *Schulenberg-Boeckeler Lumber Co.* v. *Town of Hayward*, 20 Fed. 422 (C. C. W. D. Wis.); *Straus* v. *Abrast Realty Co.*, 200 Fed. 327 (E. D. N. Y.); *Gouge* v. *Hart*, 250 Fed. 802 (W. D. Va.); dismissed for want of jurisdiction, 251 U. S. 542; *Markle* v. *Kirkendall*, 267 Fed. 498 (M. D. Pa.); *Union Fisherman's Co-op. Packing Co.* v. *Huntley*, 285 Fed. 671 (Ore.); *Black* v. *Rafferty*, 287 Fed. 937 (E. D. N. Y.); *Witherbee* v. *Durey*, 296 Fed. 576 (N. D. N. Y.); *Waldron* v. *Poe*, 1 F. (2d) 932 (W. D. Wash.); *Seaman* v. *Guaranty Trust Co. of New York*, 1 F. (2d) 391 (S. D. N. Y.); *City of Seattle* v. *Poe*, 4 F. (2d) 276 (W.

tion 2 of the Act of August 2, 1886, had no application to products composed of a mixture or compound of vegetable oil (other than "vegetable oil annatto") and also that respondent's product was not made in imitation or semblance of butter so as to be within Section 2. While we contend that the construction of the Act of August 2, 1886, by the court below was erroneous, and that Section 2 applies to compounds or mixtures of vegetable oil, the present record is probably not in proper condition to permit of a final decision as to the taxability of respondent's product, nor is such decision necessary to the disposition of this case. In the trial court the petitioner offered no testimony and relied upon his contention that Section 3224 prohibited the

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D. Wash.); *Staley* v. *Hopkins*, 9 F. (2d) 976 (N. D. Tex.); *Israelite House of David* v. *Holden*, 14 F. (2d) 701 (W. D. Mich.); *Thornhill Wagon Co.* v. *Noel*, 17 F. (2d) 407 (E. D. Va.); *Erie Taxi Co.* v. *Gnichtel*, 17 F. (2d) 661 (N. J.); *French Mortgage & Bond Co.* v. *Woodworth*, 38 F. (2d) 841 (E. D. Mich.); *Stafford Mills* v. *White*, 41 F. (2d) 58 (Mass.).

In the following cases Section 3224 was not applied for various reasons:

In *Frayser* v. *Russell*, Fed. Cas. No. 5,067 (C. C. E. D. Va.), the Collector was exceeding his jurisdiction. Cf. *Nichols* v. *Gaston*, *supra*. In *Lafayette Worsted Co.* v. *Page*, 6 F. (2d) 399 (R. I.), it was held that the Commissioner had no jurisdiction to distrain while an appeal was pending before the Board of Tax Appeals. A contrary view was taken in *Joseph Garneau Co.* v. *Bowers*, 8 F. (2d) 378 (S. D. N. Y.). Cf. *Emaus Silk Co.* v. *McCaughn*, 6 F. (2d) 660 (E. D. Pa.); *Oak Worsted Mills* v. *McCaughn*, 6 F. (2d) 662 (E. D. Pa.). In *Trinacia Real Estate Co.* v. *Clarke*, 34

maintenance of this suit. As the question of whether respondent's product was made in imitation or semblance of butter, or when so made was calculated to be sold as butter or for butter, involves solely a question of fact, and as there has been no real trial on the merits on that issue, it seems unnecessary to refer to the testimony offered on behalf of the plaintiff dealing with that subject. It is proper to say, however, that the testimony so offered indicated that the product was marketed in cartons containing quarter-pound cubes wrapped in vegetable parchment, and that it could be used as a spread and for other purposes for which butter is used. (R. 50, 58–59.) But whether the facts were favorable or adverse to petitioner, the statute forbade the suit and the trial court had no right to determine the validity of the tax.

F. (2d) 325 (N. D. N. Y.), the action of the Collector was obviously arbitrary. In *Long* v. *Rasmussen*, 281 Fed. 236 (Mont.), the complainant whose property was threatened with distraint was a stranger to the tax. In *Mertz* v. *Mellon* (Sup. Ct. D. C.), 6 American Federal Tax Reports, p. 7166 (not otherwise reported), distraint was enjoined because the liability had been extinguished by Section 1106 (a), Revenue Act of 1926 (U. S. C. Sup. IV, Title 26, Sec. 1249). Appeal dismissed as premature, 30 F. (2d) 311 (App. D. C.). The case of *Acklin* v. *People's Sav. Ass'n*, 293 Fed. 392 (N. D. Ohio), was brought by a member against an association and its officers and is classed with the special group of stockholder cases. (*Pollock* v. *Farmers' Loan & Trust Co.*, 158 U. S. 601; *Corbus* v. *Gold Mining Co.*, 187 U. S. 455; *Flint* v. *Stone Tracy Co.*, 220 U. S. 107; *Zonne* v. *Minneapolis Syndicate*, 220 U. S. 187; *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1; *Stanton* v. *Baltic Mining Co.*, 240 U. S. 103.)

II

THE ASSESSMENT BY THE COMMISSIONER WAS MADE UNDER COLOR OF HIS OFFICE AND WAS NOT ARBITRARY OR CAPRICIOUS

In *Snyder* v. *Marks, supra,* this Court held that Section 3224 applies to all assessments of taxes "made under color of their offices" by internal revenue officers charged with general jurisdiction over particular taxes. It is therefore necessary to determine whether the particular assessment in this case was so made or whether the assessment was so arbitrary and capricious as not to be under color of office.

It is the duty of the Commissioner of Internal Revenue to determine the taxability of a particular product under the Oleomargarine Act. He has general jurisdiction of the assessment and collection of all taxes imposed by any law providing internal revenue. (R. S., Sec. 321, U. S. C., Title 26, Sec. 2.) Under the general supervision of the Commissioner it is the duty of each Collector of Internal Revenue within his collection district to see that all laws and regulations relating to the collection of internal-revenue taxes are faithfully executed and complied with. (R. S., Sec. 3163, U. S. C., Title 26, Sec. 34.) It is the duty of the Collectors to cause their deputies to investigate and make a list of objects in their district liable to pay any tax (R. S., Sec. 3172, U. S. C., Title 26, Sec. 91), and where stamp taxes have not been paid at the time and in the manner provided by law the Commissioner is

required to make the necessary inquiry, determine and assess the taxes thereon, and certify such assessment to the proper Collectors, who are in turn required to proceed to collect and account for the taxes so certified (R. S., Sec. 3182, U. S. C., Title 26, Sec. 102). These general provisions of the statute are applicable to the taxes under the Oleomargarine Act. *United States* v. *Barnes,* 222 U. S. 513, 518. The Oleomargarine Act itself, however, specifically makes it the duty of the Commissioner within two years after the sale or removal of oleomargarine upon which the tax has not been paid to estimate the amount of tax, to assess the same, and certify the same to the Collector. (Act of August 2, 1886, c. 840, Section 9, 24 Stat. 209, 211; U. S. C., Title 26, Sec. 547.) It was pursuant to this statute that the Commissioner proceeded in this case (R. 9), and his determination was *prima facie* correct. *Reinecke* v. *Spalding,* 280 U. S. 227, 232; *Niles Bement Pond Co.* v. *United States,* 281 U. S. 357, 361; *Burnet* v. *Houston,* 283 U. S. 223, 227. The determination of the Commissioner as to the taxability of respondent's product, therefore, was made under color of his office.

His determination was not arbitrary or capricious. Under Section 2 of the Oleomargarine Act, before a product may be designated as oleomargarine and subject to tax as such, it must be manufactured from the ingredients named in the statute or some of them, and be made in imitation or semblance of butter, or, when so made, be calculated or intended to be sold as butter or for butter. The

decision of the court below in this case is the first and only one to hold that vegetable oils were not included among the ingredients named in Section 2 of the statute. The earlier cases turned upon the question whether the particular product under consideration was made "in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter." *Higgins Mfg. Co.* v. *Page,* 297 Fed. 644 (R. I.), 650; *Higgins Mfg. Co.* v. *Page,* 20 F. (2d) 948 (R. I.); *Baltimore Butterine Co.* v. *Mellon* (Sup. Ct. D. C.), 1 Prentice-Hall Federal Tax Service, 1927, p. 1872 (not otherwise reported).[2]

Whether a particular product is made in imitation or semblance of butter, or calculated or intended to be sold as or for such, is a question of fact as to which juries, courts, and administrative officials might reasonably differ. An analysis of the various cases dealing with products similar to the one involved in this case is contained in Appendix B, *infra,* pp. 36–39.[3]

It appears from these cases that when the question of the taxability of the same or similar prod-

[2] No appeals were taken from either of the latter two decisions granting injunctions. An examination of the files in the Department of Justice shows that no appeal was taken in the Rhode Island case because the taxpayer there had previously obtained a judgment at law that its product was not taxable, and no appeal was taken in the case in the District of Columbia because of the failure of a subordinate official to file the necessary papers within the time required by statute.

[3] This analysis discloses that with the exception of the two *Higgins* and the *Baltimore Butterine* cases above re-

Revised Statutes (*infra*, p. 30), and because the plaintiff had an adequate and complete remedy at law. (R. 31.)

A preliminary injunction was issued by the District Court for the Southern District of Florida. (R. 23.) Thereafter a hearing was held, at which the Collector introduced no testimony, since he contended that Section 3224 of the Revised Statutes prevented the issuing of an injunction. It is unnecessary for the purpose of this case to set forth the evidence. After this hearing the court made the injunction permanent by the final decree which adjudged that the equities of the cause were with the complainant (respondent here) and against the defendant (petitioner here), and that the complainant had established the material allegations of the bill of complaint. (R. 31–32.) The petitioner appealed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the District Court. (R. 83–84.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that an injunction was properly granted notwithstanding the prohibition of Section 3224 of the Revised Statutes.

SUMMARY OF ARGUMENT

The Commissioner of Internal Revenue, the officer having general jurisdiction of assessing and collecting oleomargarine taxes, held that the prod-

uct here involved was taxable, and under color of his office, through the petitioner Collector, was proceeding to make the collection. This Court has repeatedly held that injunction may not be granted in such a case. The bar of Section 3224 of the Revised Statutes is absolute where the assessment is of a tax as distinguished from a penalty in the guise of a tax, provided the assessment is made by an officer having general jurisdiction over the subject matter and he asserts that the assessment is valid. If the tax is erroneous the exclusive remedy is a suit for its recovery after payment. This Court has held that the oleomargarine tax is a tax and not a penalty. The respondent's product was subject to tax, but there was no real trial on the merits and the record is, therefore, incomplete and a decision of that question is unnecessary in this case.

2. Whether a particular product is made in imitation or semblance of butter, or calculated or intended to be sold as or for such, is a question of fact as to which juries, courts, and administrative officials might reasonably differ. The duty of determining such fact is laid primarily upon the Commissioner. If he determines the product to be taxable it is his duty under the Oleomargaine Act to assess the taxes and certify the assessment to the Collector. The assessment in this case was under color of his office, and it was not arbitrary or capricious.

this one unfavorable decision could not bind the petitioner so as to justify a restraint against the performance of his duties in connection with other products.

The bill of complaint alleged that respondent's product was a mixture or compound composed of various vegetable oils and other substances. (R. 1.) The testimony showed that respondent's product was marketed in one-pound cartons containing four cubes of four ounces each, each quarter-pound print being wrapped in vegetable parchment. (R. 50.) Accordingly the record shows that the product upon which tax was assessed was composed of vegetable oils and was packed in a manner somewhat similar to the manner in which butter is packed for retail sale. As the Commissioner construed the Oleomargarine Act as applying to mixtures or compounds of vegetable oils, and as there was a basis for his conclusion that the respondent's product was made in imitation or semblance of butter, it is obvious that his action in assessing the tax was not arbitrary or capricious.

Since each product must be dealt with separately, and since it was the duty of petitioner to assess and collect a tax if he concluded that it was due—and there is ample support for his conclusion that respondents' and similar products were taxable—it is entirely clear that the action of the Commissioner and petitioner was not arbitrary, nor, in the lan-

guage of the court below (R. 81), "so unsubstantial as to be frivolous."[5]

III

IF THERE IS ANY EXCEPTION TO THE APPLICATION OF SECTION 3224 OF THE REVISED STATUTES; THIS CASE IS NOT WITHIN IT

Section 3224 of the Revised Statutes contains no exception and seems to apply to every suit to restrain the collection of a tax, assessed by revenue officers having general jurisdiction over the assessment of the particular taxes, who are acting under color of their offices. While this explicit language would seem to admit of no exception, the possibility that there may be exceptions under extraordinary circumstances has been referred to in several decisions of this Court.

In *Dodge* v. *Osborn, supra,* a bill had been filed to enjoin assessment and collection of income taxes and the bill alleged that the statute under which the taxes were assessed was unconstitutional, that unless an injunction was granted many suits by other persons would be brought for the recovery of taxes and that the assessment of the taxes would

[5] In holding that the action of the Commissioner was arbitrary the court below also seemed to rely upon its conclusion that the Commissioner had influenced respondent to engage in the manufacture of its product by indicating that he had no present intention to attempt to assess a tax on it. (R. 83.) This is based upon a letter written to respondent in response to its request. The letter is not in the record, but extracts from it (R. 8, 60) do not support the court's view. It is immaterial, however, for the Commissioner had the right to change his mind. *Burnet* v. *Porter*, 283 U. S. 230; *Sweets Co. of America* v. *Commissioner*, 40 F. (2d) 436 (C. C. A. 2d).

constitute a cloud on plaintiff's title. This Court held that Section 3224 of the Revised Statutes applied and affirmed a judgment dismissing the complaint for want of jurisdiction. It was contended on behalf of the plaintiffs that equities sufficient to sustain jurisdiction were alleged and that accordingly the case fell within an exception to the application of the statute. The Court did not concede the correctness of this contention but, accepting it merely for the purpose of the argument, held that the allegations were wholly inadequate to sustain jurisdiction. The Court said, at page 122:

> * * * it is obvious that the statute plainly forbids the enjoining of a tax unless by some extraordinary and entirely exceptional circumstances its provision are not applicable.

In *Hill* v. *Wallace,* 259 U. S. 44, this Court considered a bill filed by members of the Chicago Board of Trade against the Board of Trade and its officers, the Commissioner of Internal Revenue and others, attacking the validity of the Future Trading Act imposing a tax on contracts for the sale of grain for future delivery. Although a motion to dismiss the bill had been made in the District Court on behalf of the United States Attorney and the Collector of Internal Revenue on the ground that the suit was to restrain the collection of a tax and was barred by Section 3224 of the Revised Statutes, the case was argued in this Court by the Solicitor General upon the merits. Dealing with

the contention that suit was barred by Section 3224, the Court said, at p. 62:

> We think these exceptional and extraordinary circumstances with respect to the operation of this act make Section 3224 inapplicable.

The circumstances mentioned were that the sale of grain without paying the tax would subject a dealer to heavy criminal penalties; that to pay a heavy tax on each of many daily transactions and then sue to recover it back would necessitate a multiplicity of suits and be impracticable; and that for the Board of Trade to refuse to apply for designation as a contract market in order to test the validity of the Act would stop the dealings of its members in a branch of the business most important to themselves and to the country.

In *Graham* v. *DuPont, supra,* a bill of complaint was filed to restrain the collection of a tax alleged to be barred by the statute of limitations. The court reversed a decree for the plaintiff and directed dismissal of the bill, distinguishing *Hill* v. *Wallace, supra,* as follows:

> * * * *Hill* v. *Wallace,* 259 U. S. 44, was in part a suit like the foregoing. It was a bill filed by members of the Chicago Board of Trade to prevent the governing board from applying to the Secretary of Agriculture to have the Board of Trade designated as a "contract market" under the Future Trading Act on the ground that the act was

unconstitutional and its operation would impair the value of the Board to its members. Without such designation, no member could have sold grain for future delivery without paying a prohibitive tax, and if he sold without paying the tax, he was subjected to heavy criminal penalties. To pay such a tax on each of the many thousands of transactions on the Board, and to sue to recover them back would have been utterly impracticable. It would have blocked the entire future grain business of the country and would have seriously injured not only the members of the Board but also the producing and consuming public. This phase of the situation was so clear that the Government in effect consented to the temporary injunction. See *Hill* v. *Wallace,* 257 U. S. 310, s. c. 615. Under these extraordinary and most exceptional circumstances, it was held that Section 3224 was not applicable to prevent an injunction against collection of such a prohibitive tax imposed for the purpose of regulating the future grain business with all the unnecessary and disastrous consequences its enforcement would entail if the act was unconstitutional. *Hill* v. *Wallace* should, in fact, be classed with *Lipke* v. *Lederer, supra* [259 U. S. 557], as a penalty in the form of a tax.

To these cases must be added *Bailey* v. *George,* 259 U. S. 16, in which this Court directed the dismissal of a bill brought to enjoin a levy and sale of property for a penalty in the guise of a tax under

the Child Labor Law, which on the same day had been decided to be unconstitutional in the *Child Labor Tax Case,* 259 U. S. 20. While the bill was dismissed, it was intimated that if the complainants had alleged facts which would have prevented them from availing themselves of their remedy at law the bill might have been entertained.[6]

In the *State Railroad Tax Cases, supra,* this Court pointed out that a clear case for equitable relief would be required before it would sustain an injunction against the collection of a State tax, and based its conclusion upon the policy disclosed by Section 3224 of the Revised Statutes, to limit the courts from interfering with the process of collecting taxes in any case.

This Court has never defined the exceptional circumstances, if any, which would justify disregarding the express prohibition contained in Sec-

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[6] *Dodge* v. *Brady*, 240 U. S. 122, is not to be classed as an exception to the application of Section 3224. It was a companion case to *Dodge* v. *Osborn*, *supra*, and was originally brought to enjoin the collection of income surtaxes. Upon the denial of a preliminary injunction the taxes were paid and a supplemental bill filed praying for their recovery which failed to allege the necessary prerequisite of an application for refund. The court below dismissed the bill on the merits. This Court recognized the applicability of Section 3224 to the original bill, but owing to the futility of further litigation of questions which had been considered and disposed of at the same term in *Brushaber* v. *Union Pac. R. R.*, 240 U. S. 1, it affirmed the judgment of the court below notwithstanding the jurisdictional defect in the supplemental bill.

tion 3224, nor is there occasion for such definition here, for when the circumstances upon which the respondent relies to escape the bar of the statute are examined it is apparent that the statute must be applied.

The "exceptional circumstances" upon which the respondent apparently relies to escape the bar of Section 3224 of the Revised Statutes are: (1) That in *Higgins Manufacturing Company* v. *Page*, 297 Fed. 644, the District Court for Rhode Island decided a case involving a similar product adversely to the Government, and that no appeal was taken; (2) that the Commissioner at one time indicated that he had no present intention of assessing a tax on respondent's product; (3) the allegation in the bill of complaint that the statute under which the tax was assessed was unconstitutional; (4) that to pay the tax and litigate the question of the validity of the assessment at law would be injurious to respondent's business, and accordingly that respondent had no adequate remedy at law.

We have already dealt with the claim that *Higgins Manufacturing Company* v. *Page, supra,* was binding upon this petitioner. That case involved a different product having different attributes. It is clear that that decision did not constitute a former adjudication by which the petitioner was bound, nor did that decision relieve respondent's product from tax upon any other theory.

The record does not show, as the court below held (R. 82–83), that the petitioner had induced the

respondent to engage in the manufacture of its product by informing it that it was not taxable under the Oleomargarine Act. While apparently the respondent was advised at one time that the Commissioner then had no present intention of assessing a tax on its product, this did not prevent the Commissioner and the petitioner from assessing a tax later, if they then concluded that it was their duty to do so. *Burnet* v. *Porter, supra; Sweets Co. of America* v. *Commissioner, supra.* The fact that respondent embarked on manufacture in the hope that no tax would be assessed and with some basis for that hope could not estop the Government or its officers from assessing and collecting taxes due.

The claim of unconstitutionality was without foundation. *McCray* v. *United States, supra.* Nor can such a claim remove the statutory prohibition against the suit. *Dodge* v. *Osborn, supra,* at p. 121.

The mere allegation of facts to support the allegation that the respondent had no adequate remedy at law did not present an exceptional circumstance justifying the granting of a prohibited injunction. Even in the absence of the prohibitory statute, no injunction could be granted in any case without the allegation of the necessary facts to confer equity jurisdiction. But the statute prohibits the exercise of that jurisdiction, even when such facts are alleged.

The facts which respondent alleged to support its assertion, that it was without an adequate remedy at law, in addition to those already mentioned, were in substance that a tax of ten cents a pound upon the product which the respondent had already manufactured would amount to such an enormous amount that it would be impossible for respondent to pay the same and sue to recover. (R. 10.) The assessment involved in this case was $5,000, and there was no proof that the respondent was not able to pay this sum. There was no proof that any attempt had been made to distrain respondent's property, or to assess and collect other taxes in addition to the $5,000 assessed for the month of January, 1929. The record shows that respondent and other manufacturers had submitted offers of compromise for a nominal sum of the taxes assessed pursuant to agreement with the Commissioner and that pending action thereon respondent continued to manufacture its product. (R. 64–65.)

A further reason alleged in the bill for the inadequacy of the remedy at law was that the respondent was suffering immediate and irreparable injury and loss of property rights (R. 10), and this allegation was apparently based upon the further allegation that dealers and agents of the respondent, fearing the taxes and penalties demanded by the petitioner, had ceased their purchase of respondent's product, canceling existing orders and substituting other products, and that unless relief was

granted the business of the respondent would be destroyed. Some testimony was offered by the respondent indicating that the assessment of the tax had affected respondent's business. (R. 54–55.) The testimony indicated, however, that there might have been other reasons for the decline in the sale of respondent's product. (R. 57–58, 62.) We submit that these allegations and the proof offered in support thereof were entirely insufficient to justify the District Court in entertaining jurisdiction of the suit for injunction, and were in no sense extraordinary and exceptional circumstances. They were the usual circumstances attending a business enterprise, conducting a competitive business in an article subject to tax which had previously escaped taxation. Of course the payment of a tax on such an article would be inconvenient, and might result in some confusion in the enterprise, but that did not justify the granting of an injunction which was prohibited by statute; nor did the circumstances show the absolute necessity for equity interference. See *Corbus* v. *Gold Mining Company,* 187 U. S. 454.

There were, to quote respondent's witness, "a thousand and one conditions" affecting the market (R. 62); and it is quite as consistent with the testimony that the decline in respondent's business was due to the general economic depression (the presence of which the courts will judicially notice, *Lincoln Gas Co.* v. *Lincoln,* 250

ucts has been considered in actions at law the Government has prevailed, except in the first *Higgins* case, *supra*. The District Court for the Western District of Missouri held a similar product to be taxable. *Harrow-Taylor Butter Co.* v. *Crooks*,

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ferred to injunctions were granted in two cases. One, decided in 1930 and now on appeal to the Court of Appeals of the District of Columbia, involved the Higgins product which had been considered in the earlier cases (*Higgins Mfg. Co.* v. *Burnet* (Sup. Ct. D. C.), not reported). In the other, a preliminary injunction was issued at the instance of this respondent after the decision of the District Court in this case, the proceedings being suspended until the decision in the instant case (*Standard Nut Margarine Co.* v. *Burnet* (Sup. Ct. D. C.) not reported). In conflict with the foregoing, injunctions were denied in three cases. (*Harrow-Taylor Butter Co.* v. *Mellon* (Sup. Ct. D. C.), not reported; *Ed S. Vail Butterine Co., Standard Nut Margarine Co., and seven others*, v. *Blair* (Sup. Ct. D. C.), not reported; *Filbert-Kuhlemann Co.* v. *Tait* (Md.), 1 Prentice-Hall Federal Tax Service, 1931, p. 247, not otherwise reported.)

Although the Commissioner was of the opinion that respondent's and similar vegetable oil products were properly taxable under Section 2 of the Act of August 2, 1886, *infra*, Appendix A, pp. 30–35, the injunction granted in the *Higgins* case in Rhode Island, and the granting of the temporary injunction in this case led him to recommend to Congress the amendment of the section as the most satisfactory solution of the problem in order to avoid a multiplicity of suits and further conflicting court decisions. (R. 79.) The section was accordingly amended by the Act of July 10, 1930, c. 881, 46 Stat. 1022, *infra*, Appendix A, pp. 31–32. The amended section clearly includes vegetable oil compounds churned in water and containing a moisture content in excess of one per centum or common salt. The legislative history of this amendment is set forth in the opinion of the court below (R. 78–80). As it has no immediate relevancy to the questions now presented it seems unnecessary to discuss it herein.

not reported (opinion contained in Appendix C, *infra*, pp. 39–44). Its judgment was affirmed by the Circuit Court of Appeals for the Eighth Circuit (41 F. (2d) 627). The District Court for the Eastern District of South Carolina held the identical product involved in this case to be taxable in a case in which this respondent was the plaintiff. (*Standard Nut Margarine Co.* v. *Jones*, not reported; the opinion is printed as an appendix to the petition for certiorari in this case, pp. 16–27.) No appeal was taken. The decision in the first *Higgins* case, *supra*, was placed squarely on the ground that the product there involved was not made in imitation or semblance of butter or calculated or intended to be sold as or for butter. The product there involved was marketed in a form different from respondent's product (see 297 Fed. 644, 648). Respondent's bill of complaint referred to that decision as binding upon petitioner in determining whether other and different products were subject to tax and the court below seems to have based its decision in part upon the failure of the Commissioner to appeal from that decision.* It is clear, however, that each product must be judged on its own content, form, and other attributes, and that

*The court below referred (R. 79–80) to its own *per curiam* decision in *Talmadge* v. *Baltimore Butterine Co.*, 37 F. (2d) 1014, affirming *Baltimore Butterine Co.* v. *Talmadge*, 32 F. (2d) 904. That case arose under the Food and Drugs Act of Georgia and while the District Court inferentially held that respondent's product was not intended to be an imitation of butter the sole question was whether it was "adulterated or misbranded."

APPENDIX A

STATUTES AND REGULATIONS INVOLVED

Section 3224 of the Revised Statutes (U. S. C., Title 26, Sec. 154) provides:

> No suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

Section 267 of the Judicial Code, c. 231, 36 Stat. 1087, 1163 (U. S. C., Title 28, Sec. 384) provides:

> Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law.

The Act of August 2, 1886, c. 840, 24 Stat. 209, provides in part:

> SEC. 2. That for the purposes of this act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as "oleomargarine," namely: All substances heretofore known as oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine-oil, butterine, lardine, suine and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef-fat, suet, lard, lard-oil, vegetable-oil annotto, and other coloring matter, intestinal fat, and offal fat made in imitation or semblance of

butter, or when so made, calculated or intended to be sold as butter or for butter. (U. S. C., Title 26, Sec. 541.)

SEC. 9. That whenever any manufacturer of oleomargarine sells, or removes for sale or consumption, any oleomargarine upon which the tax is required to be paid by stamps, without the use of the proper stamps, it shall be the duty of the Commissioner of Internal Revenue, within a period of not more than two years after such sale or removal, upon satisfactory proof, to estimate the amount of tax which has been omitted to be paid, and to make an assessment therefor and certify the same to the collector. The tax so assessed shall be in addition to the penalties imposed by law for such sale or removal. (U. S. C., Title 26, Sec. 547.)

Act of July 10, 1930, c. 881, 46 Stat. 1022 (U. S. C. Sup. IV, Title 26, Sec. 541):

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of the Act entitled "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August 2, 1886, as amended, is amended to read as follows:

"SEC. 2. That for the purposes of this Act certain manufactured substances, certain extracts, and certain mixtures and compounds, including such mixtures and compounds with butter, shall be known and designated as 'oleomargarine,' namely: All substances heretofore known as oleomargarine, oleo, oleomargarine oil, butterine, lardine, suine, and neutral; all mixtures and compounds of oleomargarine, oleo, oleomargarine oil, but-

terine, lardine, suine, and neutral; all lard extracts and tallow extracts; and all mixtures and compounds of tallow, beef fat, suet, lard, lard oil, fish oil, or fish fat, vegetable oil, annatto, and other coloring matter, intestinal fat, and offal fat;—if (1) made in imitation or semblance of butter, or (2) calculated or intended to be sold as butter or for butter, or (3) churned, emulsified, or mixed in cream, milk, water, or other liquid, and containing moisture in excess of 1 per centum or common salt. This section shall not apply to puff-pastry shortening not churned or emulsified in milk or cream, and having a melting point of one hundred and eighteen degrees Fahrenheit or more, nor to any of the following containing condiments and spices: salad dressings, mayonnaise dressings, or mayonnaise products nor to liquid emulsion, pharmaceutical preparations, oil meals, liquid preservatives, illuminating oils, cleansing compounds, or flavoring compounds."

SEC. 2. This Act shall take effect twelve months after the date of its enactment.

Approved, July 10, 1930.

Treasury Regulations 9 relating to taxes on oleomargarine, etc. (Revised August, 1925):

SEC. 40. *Substances, etc., taxable as oleomargarine—Commissioner's decision final.*—(*a*) When any substance declared by any collector of internal revenue to be oleomargarine and liable to tax is claimed by the owner to be butter or some other substance not liable to tax, the collector will submit a sample of the article for the decision of the Commissioner of Internal Revenue, under whose direction it will be

subjected to tests to determine its character. Each such sample must weigh not less than one pound, and must be taken in the presence of an internal revenue officer. In case search is to be made for unusual coloring matter in oleomargarine, at least 2 pounds should be sent. (For more specific instructions relative to sampling, see sec. 112.) The Commissioner's decision as to any substance will not afford any indication as to what his decision will be as to another substance, although such other substance may be similarly marked and labeled. If the decision of the Commissioner, when rendered, is favorable to the claimant, the collector will be directed to release the goods. If the Commissioner's decision sustains the collector, forfeiture proceeding will be instituted.

(*b*) *Cooking compounds or substitutes for lard; when taxable.*—All animal fats or oils, vegetable oils, and all compounds and mixtures of such animal fats or oils and vegetable oils, with or without the addition of coloring matter, which have been churned in cream, milk, or water, or bathed in a solution of brine, thereby imparting to the resultant product the flavor, texture, and appearance of butter, are properly taxable under the law as oleomargarine. Cooking compounds or substitutes for lard which are placed on the market in good faith as such and which do not resemble butter in general characteristics are exempt from tax as oleomargarine. (T. D.'s 1354, 1434.)

Treasury Decision 4006 (C. B. VI–1, pp. 333–334):

TREASURY DEPARTMENT,
OFFICE OF COMMISSIONER OF
INTERNAL REVENUE,
Washington, D. C.

To Collectors of Internal Revenue and Others Concerned:

Paragraph (b) of section 40, Regulations 9 (revised August, 1925), relative to the tax on oleomargarine and other substances, is hereby amended to read as follows:

(b) Cooking compounds: Cooking compounds which are placed on the market in good faith as such, and which do not resemble butter in flavor, texture, or appearance, are exempt from the tax imposed upon oleomargarine.

All animal fats or oils, vegetable oils, and all compounds and mixtures of such animal fats or oils, or vegetable oils, with or without the addition of coloring matter, which have been churned in milk or cream with the effect of causing the resultant product to assume a flavor, texture, and appearance resembling that of butter, are properly taxable under the law as oleomargarine.

All vegetable or animal oils or combinations thereof, churned, emulsified, or however mixed, colored to look like butter, crystalized, salted (or unsalted), and worked, will be deemed to possess a sufficient similarity to butter in flavor, texture, and appearance to bring the resultant product within the classification of oleomargarine.

All compounds referred to above as being taxable as oleomargarine which are found on the market on and after the effective date

of this Treasury decision will be held subject to the tax.

The provisions of this Treasury decision will take effect six months after the date of approval, and all rulings inconsistent therewith are hereby revoked as of that date.

D. H. BLAIR,
Commissioner of Internal Revenue.

Approved April 1, 1927.

OGDEN L. MILLS,
Acting Secretary of the Treasury.

(The effective date of T. D. 4006 was extended to July 1, 1928, by T. D. 4085, C. B. VI-2, p. 381, and T. D. 4114, C. B. VII-1, pp. 334-335. It was revoked, however, April 13, 1928, by T. D. 4149, C. B. VII-1, p. 334.)

APPENDIX B

CASES INVOLVING TAXABILITY OF VEGETABLE OIL COMPOUNDS SIMILAR TO PRODUCT INVOLVED IN THIS CASE

1924—*Higgins Mfg. Co.* v. *Page* (R. I.), 297 Fed. 644. Action at law to recover tax paid under protest on a product composed of vegetable oils. The product was held "not made in imitation or semblance of butter, or, when so made, calculated or intended to be sold as butter or for butter." Judgment for plaintiff.

1927—*Higgins Mfg. Co.* v. *Page* (R. I.), 20 F. (2d) 948. In Equity. Injunction granted to restrain the collection of tax on the same product considered in the foregoing case.

1927—*Baltimore Butterine Co.* v. *Mellon* (Sup. Ct. D. C.), 1 Prentice-Hall Federal Tax Service, 1927, p. 1872 (not otherwise reported). Bill to enjoin collection of tax. The Treasury Department had promulgated T. D. 4006, C. B. VI–1, p. 333 (see Appendix A, pp. 30–35). The court held that the provisions of the Oleomargarine Act could not be enlarged by regulation, and an injunction was issued restraining the enforcement of T. D. 4006 so far as it applied to the product there under consideration, which was alleged to be the same as the

product considered in the *Higgins cases*. Following this decision, T. D. 4006 was revoked (C. B. VII–1, p. 334).

1929 (March)—*Harrow-Taylor Butter Co.* v. *Mellon* (Sup. Ct. D. C.), Docket No. 49479 (not reported). Bill to enjoin collection. Preliminary injunction was denied, and the bill later was dismissed.

1929—*Ed S. Vail Butterine Co., The Standard Nut Margarine Co., The Dixie Nut Margarine Co., The Ideal Food Products Co., E. F. Drew & Co., National Foods, Inc., The Ill.-Mo. Manufacturing Co., The Olsen Food Products Co., The Kansas Nut Margarine Co.* v. *Blair* (Sup. Ct. D. C.), Docket No. 49751 (not reported). Preliminary injunction denied and bill dismissed.

1929—*Harrow-Taylor Butter Co.* v. *Crooks* (W. D. Mo.) (not reported). Action to recover tax paid under protest. For copy of opinion see Appendix C, pp. 39–44. The product was held to be taxable.

1930—*Harrow-Taylor Butter Co.* v. *Crooks* (C. C. A. 8th), 41 F. (2d) 627, affirming the judgment of the District Court for the Western District of Missouri in the above case.

1930—*Filbert-Kuhlemann Co.* v. *Tait* (Md.), 1 Prentice-Hall Federal Tax Service, 1931, p. 247 (not otherwise reported). Bill to enjoin collection. Bill dismissed.

1930—*Higgins Mfg. Co.* v. *Burnet* (Sup. Ct. D. C.), Docket No. 51890 (not reported). Action to enjoin collection of tax. Permanent injunction granted. Now pending on appeal to the Court of Appeals of the District of Columbia.

1930—*Standard Nut Margarine Company* v. *Burnet* (Sup. Ct. D. C.), Docket No. 52174 (not reported). Bill to enjoin collection of tax. Preliminary injunction granted and further proceedings suspended awaiting the outcome of the instant case.

1930—*Standard Nut Margarine Company* v. *Jones* (E. D. S. C.) (not reported. For copy of the opinion see Appendix to petition for certiorari in this case, pp. 16–27). Action by respondent in the instant case to recover tax paid on the identical product here involved. The court held that the product was taxable and gave judgment for the Government. Respondent did not appeal this case.

APPENDIX C

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DIVISION OF THE WESTERN DISTRICT OF MISSOURI

No. 7569

THE HARROW-TAYLOR BUTTER COMPANY, A MISSOURI corporation, plaintiff

v.

NOAH CROOKS, UNITED STATES COLLECTOR OF INTERNAL REVENUE for the Sixth District of Missouri, defendant

This is an action at law to recover certain taxes which, it is alleged, were paid under protest. A jury was waived by stipulation of the parties and the cause tried to the court.

Said tax was collected under an act approved August 2nd, 1886. That act, with subsequent amendments, imposes a stipulated tax upon manufactured substances classed as oleomargarine. In defining what substances should be so classed, the following pertinent definitions were given in the act:

> All mixtures and compounds of tallow, beef fat, suet, lard, lard oil, *vegetable oil annotto,* and other coloring matter, etc.

It was further provided by said act that all substances falling within the above definition should be taxable if "made in imitation or semblance of butter, or when so made, calculated or intended to be sold as butter or for butter."

U. S. 256, 268; *Galveston Electric Co.* v. *Galveston*, 258 U. S. 388, 402; *Banton* v. *Belt Line Ry.*, 268 U. S. 413, 422; *McCardle* v. *Indianapolis Co.*, 272 U. S. 400, 412; *Russell* v. *Commissioner*, 45 F. (2d) 100, 102 (C. C. A. 1st), as that it was due to the assessment of the tax. Whatever the cause, the District Court was not free to disregard the plain language of Section 3224 of the Revised Statutes, and the court below erred in holding that this case presented unusual and extraordinary circumstances justifying the issuance of an injunction.

We submit there are no real exceptions to the application of Section 3224 of the Revised Statutes if the injunction sought is to restrain the collection of a tax assessed by revenue officers charged with general jurisdiction of the subject of assessing taxes when acting under color of their offices, but if there are any exceptions they do not permit the maintenance of this suit, which presents merely an attempt to test the validity of an assessment alleged to be erroneous in the manner most convenient to the taxpayer.

CONCLUSION

The judgment of the court below should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
G. A. YOUNGQUIST,
Assistant Attorney General.
WHITNEY NORTH SEYMOUR,
SEWALL KEY,
A. H. CONNER,
Special Assistants to the Attorney General.
C. M. CHAREST,
General Counsel,
Bureau of Internal Revenue.
HARRISON F. MCCONNELL,
Special Attorney,
Bureau of Internal Revenue,
Of Counsel.

NOVEMBER, 1931.

The plaintiff has a product which it designates "Rich Nut Shortening." Admittedly it contains no animal fat but is wholly composed of mixtures or compounds of vegetable oils, salt, benzoate of soda, water and artificial coloring matter.

The Commissioner of Internal Revenue determined that such manufactured substance should be classed as oleomargarine and moreover that it was made in imitation or semblance of butter and that it became taxable under said act.

The plaintiff makes the manifold contention (a) that such a substance is not within the purview of the act; (b) that if so, said act is unconstitutional; (c) that the questions here involved have been previously adjudicated and (d) that the evidence shows that such substance was neither made in imitation or semblance of butter nor was it calculated or intended to be sold as butter or for butter.

1. Adverting to the first proposition that said substance is not within the purview of the act, it is to be noted that the act contains the language—

> All mixtures and compounds of * * * vegetable-oil annotto and other coloring matter, etc.

Plaintiff says that vegetable oil was not employed at the date of the enactment in the manufacture of substances such as the substance in question. Moreover, it is insisted that the words vegetable oil were used to describe the word annotto and that said substance was a mere coloring matter. In other words it is the contention of the plaintiff that only mixtures and compounds containing animal fat were defined and classed as oleomargarine.

The defendant, on its part, says that the words vegetable-oil should have been followed by a comma

so as to separate said words from the word "annotto" following.

The plaintiff has presented for the inspection of the court original and authentic records of the act as same was passed and signed by the presiding officers of the House of Representatives and the Senate of the United States. Such record fails to disclose a comma between the words "vegetable-oil" and the word "annotto." Plaintiff offered testimony that a substance known as vegetable-oil annotto as a coloring matter was actually in use at the time of the enactment of said law. On this question, however, there was opposing evidence.

The court is called upon in the first instance to interpret the meaning of said section and to determine whether or not it should be construed as if a comma were in fact inserted. The original records of the bill do not particularly aid in such interpretation. Such records do prove conclusively the enactment of the law.

It is well settled "that punctuation is a fallible standard of the meaning of a statute, and the last resort as an aid in its interpretation, though it may be resorted to as such aid when the meaning of the statute is doubtful." (25 R. C. L. 965, Section 220; *Northern Pacific Railway Co.* v. *United States*, 227 U. S. 355, l. c. 360; 36 Cyc. 1117; Words and Phrases judicially defined.)

Contrary to the evidence offered by plaintiff, the defendant proved that vegetable-oil was not only known but used in the manufacture of similar substance at the time of the enactment of said law. Moreover, the evidence was not satisfactory that such a substance as "vegetable-oil annotto" was ever used extensively for coloring matter.

There was evidence that the printed bill taken from Congressional files showed that a comma was inserted after the word vegetable-oil. Moreover, no reason seemed to exist for designating any single coloring matter as "vegetable-oil annotto." Annotto, according to the evidence, was a coloring matter wholly independent of vegetable-oil.

In the case of *Higgins Mfg. Co.* v. *Page,* 297 Fed. 644, l. c. 651, Judge Brown of the District of Rhode Island granted a request for findings of law, as follows:

> That the phrase "vegetable-oil annotto and other coloring matter" contained in section 2 of the Act of August 2, 1886 (24 Stats. 209), should be read as though there were a comma after the word "oil."

Apparently Judge Brown was of the opinion that the act should be interpreted as if the comma had been inserted. The decision of Judge Brown did not rest on this point, however, but was based upon his view that the product there under inquiry was "not made in imitation or semblance of butter or when so made calculated or intended to be sold as butter or for butter."

With respect to the substance there under inquiry, the Commissioner of Internal Revenue had previously ruled that it was not made in imitation or semblance of butter. The court simply followed the ruling of the Commissioner. Said opinion must be considered, however, as holding that there was such a mixture or compound as could be made up of vegetable-oil and other ingredients, excluding animal fats, and that in a proper case such substances might be classed for the purposes of taxation as oleomargarine.

A reasonable interpretation of said statute would require the insertion of the comma after the word oil and before the word annotto.

2. There is nothing in the language of the act as contended by the plaintiff to indicate a purpose on the part of Congress to regulate rather than tax. The act itself is a pure Revenue Act and has no regulatory features, unless it be in the language that exempts from the tax if not made in imitation and semblance of butter. The right and power of Congress to impose such a tax, even though burdensome, can not be questioned.

3. There has been no adjudication of the questions here involved. Rulings have been promulgated from time to time by the Commissioner of Internal Revenue and such rulings have had the force of law. However, in no case has such a ruling been made and promulgated by the Commissioner of Internal Revenue that might become applicable to the facts here presented. In each ruling certain conditions were named. Such conditions are not present in the instant case. It can not be said that the Commissioner had previously ruled favorably to the plaintiff with respect to the product under inquiry for the reason that the plaintiff did not submit to the Commissioner its product as sold to the public. The samples submitted were without coloring matter.

4. There remains the final inquiry as to whether plaintiff's product is "made in imitation or semblance of butter or when so made calculated or intended to be sold as butter or for butter."

With commendable frankness plaintiff offered testimony as to the nature and character of its product and the demand of the public therefor.

Plaintiff did not by its advertisements, nor by its containers or printed matter offer its product as butter or a substitute for butter, yet the evidence was overwhelming that retail merchants, restaurant keepers and others carried and used plaintiff's product "as butter and for butter."

Retail merchants kept said product with their butter and recognized oleomargarine substances and proffered same to their customers as a suitable substitute for butter. Restaurant keepers regularly served said product as butter and for butter.

The evidence was overwhelming that said substance not only looked like butter but that it had the taste of butter. It was put up in cartons similar in size and shape as butter. It was not used except very moderately for "shortening," as indicated on plaintiff's cartons. Plaintiff acknowledged that sharp competition had forced the use of this substance. Such competition was for butter substitutes. Plaintiff undoubtedly knew that the demand for its product was not alone for "shortening" in baking, but as butter substitute.

It would be idle to say that the plaintiff did not know that its customers, the retail dealers, were selling said substance as a butter substitute. Said substance was not only "made in imitation or semblance of butter" but it was "calculated" and "intended to be sold as butter or for butter."

In view of the foregoing, the judgment of the court will be for the defendant.

Kansas City, Missouri, August 5th, 1929.

ALBERT L. REEVES,
United States District Judge.

APPENDIX D

IN THE SUPREME COURT OF THE DISTRICT OF COLUMBIA

Holding an Equity Court

EQUITY No. 51890

HIGGINS MFG. CO., ETC.

v.

DAVID BURNET ET AL., ETC.

MEMORANDUM

In my judgment, the permanent injunction should be granted in this case as prayed in the bill.

As soon as possible I shall prepare and file findings of fact and conclusions of law to be made part of my decision. But because of the importance of the matter to the plaintiff I think the decree should be signed promptly upon submission by counsel.

1. As to the objection that section 3224 RSUS prohibits the relief, I agree with the reasoning of the decision of Judge Lowell, of the United States District Court for the District of Rhode Island, in *Higgins Mfg. Co.* v. *Page,* that this is one of the cases to which the Supreme Court referred in *Dodge* v. *Osborn,* 240 U. S. 122, as extraordinary and exceptional circumstances; see also Memoran-

dum Opinion of Mr. Justice Bailey in *Baltimore Butterine Co.* v. *Mellon,* Equity No. 47120, granting a preliminary injunction in that case.

2. I am unable to adopt the contention of counsel for the defendants that under section 14 of the Act of 1886, as amended, the act of the Commissioner of Internal Revenue is final on the courts in this particular case. That section authorizes the Commissioner "to decide what substances, extracts, mixtures, or compounds which may be submitted for his inspection in contested cases are to be taxed under this Act"; and upon this "his decision in matters of taxation under this Act shall be final."

The evidence here shows that the action of the Commissioner was not in what may properly be termed a "contested" case. The action of the Commissioner was based upon an ex parte investigation conducted by the agents and chemists of the Bureau of Internal Revenue. There was no hearing; plaintiff was not notified of the investigation, and was given no opportunity to present evidence.

In view of the decisions in favor of plaintiff in *Higgins Mfg. Co.* v. *Page,* 297 F. 645, and *Higgins Mfg. Co.* v. *Page,* 20 F. (2d) 948, I can not believe that any subsequent decision of the Commissioner of Internal Revenue is conclusive upon this Court in the present proceeding.

3. I think it might reasonably be held that the doctrine of *res adjudicata* is applicable in the present case. The suit at law in 297 F. 645 and the injunction suit in 20 F. (2d) 948 were against the Collector of Internal Revenue. No appeal was taken by him from the adverse decisions. To one familiar with the administrative conduct of the executive bureaus it is reasonable to assume that

the failure to appeal was by direction of the then Commissioner of Internal Revenue, the immediate superior of the defendant. This is confirmed by the allegations of the defendants to the answer (par. 13) from which it appears that appeals were not taken because the Government's case was not presented in those cases as strongly as it should have been.

But without holding that the decisions above mentioned constitute *res adjudicata*, I think they are very persuasive and that I should follow them unless a very different case is made out by the evidence presented here.

4. I find from the evidence that Higgins Nut Product is manufactured from the same component materials and marketed by the plaintiff as said product was found to be made and marketed by the plaintiff by the decision and judgment of the United States District Court for the District of Rhode Island in the law case above described, reported in 297 F at 644.

While the defendant has given some evidence tending to show that Higgins Nut Product as now sold is somewhat more like butter than the product sold in 1924, the evidence does not convince me that the present product is substantially different from the old.

Therefore I will sign the decree as above outlined.

JESSE C. ADKINS, *Justice.*

(Not dated. Decree was signed Oct. 15, 1930.)

U. S. GOVERNMENT PRINTING OFFICE: 1931